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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES AND THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA,

Petitioners,

VS.

THE REVEREND JOHN D. BARKER, et al.,

Respondents.

On Petition For Writ of Certiorari To The Court of Appeal for the State of California Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Was the lower court's use of the neutral principles approach "retroactive," from a constitutional standpoint, even though such is consistent with previous California cases, petitioners took no action to assert their purported hierarchical control, and the "hierarchy" approach is inapplicable because the identity of the governing church body is at least a matter of substantial controversy?

2. Can a State reject the so-called "implied trust approach" on grounds that such would require civil courts to address and resolve what are essentially religious issues?

3. Can a State apply the neutral principles approach, in terms of inquiring whether an express trust exists in favor of the general church, even if the general church is "hierarchical" with regard to ecclesiastical matters?

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STATEMENT OF THE CASE

This brief is being filed on behalf of respondents St. Mary of the Angels' Parish, St. Matthias Parish, and Church of Our Saviour, the three local churches which prevailed in the court below, in opposition to the petition for certiorari filed by The Protestant Episcopal Church in the Diocese of Los Angeles and The Protestant Episco-

pal Church in the United States of America, hereafter referred to as "petitioners."[1]

Both before and after the time they disaffiliated from the Diocese and the national church in 1977, St. Marys, St. Matthias and Our Saviour were all duly-constituted California nonprofit corporations. Each was the sole legal owner of its real property, with the relevant deeds showing no interest whatsoever in either the Diocese or the national church. Each maintained exclusive possession and control of its property, both real and personal, and substantially all the property at issue was paid for by their present members, former members, and non-member benefactors other than petitioners. Moreover, and as will be discussed in greater detail below, each has had a long history of autonomy and independence in matters concerning local church property.

A. St. Marys

St. Marys was incorporated under California law as a nonprofit religious corporation in 1930. It was originally founded by the Reverend Neil Dodd, the so-called "Padre of Hollywood", who began the mission as a storefront operation in Hollywood, California. Early worship services were held in a small church building located on New Hampshire Avenue, commonly known as the "Little Church Around the Corner." According to an early history of the mission, Fr. Dodd "became the unofficial spiritual guide of the whole movie colony—Jew, Protestant, and Catholic."

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[1]We take no position with regard to the petition for certiorari filed by the Rector, Wardens and Vestrymen of the Church of the Holy Apostle in Glendale, California, Docket No. 81-141.

Shortly after it was incorporated, St. Marys received the land on which the church now stands as a gift from one of its parishioners. The deed made no reference whatsoever to the Diocese or the national church, nor was any type of reversionary interest created in their favor. The deeds to the other three parcels of land subsequently owned by St. Marys likewise make no mention of the Diocese or the national church.

Except for very modest contributions during the early years, neither the Diocese nor the national church ever provided any financial support to St. Marys. Nor did the Diocese or the national church contribute anything toward the purchase of any of St. Marys' real property. By contrast, between 1920 and 1974 St. Marys contributed approximately $161,000 to the Diocese.

On January 23, 1977, the membership at St. Marys overwhelmingly approved, by a vote of 80 to 7 with one member abstaining, an amendment to St. Marys' articles of incorporation which deleted all references to the Diocese and the national church. From a functional standpoint, however, St. Marys continued to hold religious services, maintain its property, and otherwise conduct its spiritual and temporal affairs in exactly the same manner as before.

B. St. Matthias

St. Matthias was established as a mission in 1905 by an Anglo-Catholic group of parishioners who had been brought up in the tradition of the Oxford Movement. Shortly thereafter, they purchased the property with their own funds,

and in 1907 St. Matthias was formally incorporated as a nonprofit religious corporation.

At no time in its history did St. Matthias receive any financial assistance of any sort from the Diocese or national church, nor did either ever contribute any funds to St. Matthias for the purchase of any of its real property. On the other hand, St. Matthias contributed approximately $127,000 to the Diocese over the years.

None of the deeds to St. Matthias' real property contains any language showing any interest in favor of the Diocese or the national church, and in each case the sole legal owner of record is the local parish corporation. Neither the Bishop nor anyone from the Diocese was ever a vestryman at St. Matthias, nor ever received notice of vestry meetings. St. Matthias hires its own employees without review by the Diocese, and the vestry makes all decisions regarding how the parish funds should be invested, whether stock should be sold or kept, and so forth. Like St. Marys and Our Saviour, St. Matthias has been fully independent from the Diocese and the national church in secular matters and all matters relating to local church property.

In early 1977 the membership at St. Matthias unanimously approved a resolution, with two abstentions, to delete all references in St. Matthias' articles to the Diocese and the national church. However, it continued to operate as a nonprofit corporation in the same manner and at the same location as before.

C. Our Saviour

Our Saviour was organized as a mission in 1930, with early services being held at a location known as The Community Church of Carthay Center in Los Angeles. It was incorporated in 1944 as a nonprofit religious corporation under California law.

Our Saviour has long been financially independent from the Diocese, with parish expenses being met entirely by voluntary contributions from its members. At no time did the Diocese or national church render any substantial financial assistance to Our Saviour, even during the time it was a mission, while Our Saviour has contributed approximately $50,000 to the Diocese during its history. Our Saviour even made modest financial contributions to the Diocese for more than five years during which time its rector was required to be a "part-time priest" because of the local church's precarious financial condition. Still, the Diocese provided no financial assistance in return. At all times the vestry at Our Saviour has been in exclusive charge of the temporal affairs of the corporation, including the management and control of its real and personal property.

In early 1977 the vestry and membership at Our Saviour unanimously approved a resolution severing all its ecclesiastical ties to the Diocese and the national church. Despite these formal changes, the membership continued to meet and conduct their spiritual and secular affairs in the same manner as in the past.

In a comprehensive and well-reasoned decision the California Court of Appeal, Second District, held that St. Marys, St. Matthias and Our Saviour were entitled to re-

tain possession of their local church property under neutral principles of law, following previous California decisions in this area and this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979). Petitioners sought a rehearing, which was denied. Petitioners then sought a hearing in the California Supreme Court, raising arguments which were virtually identical to those they urge in their present petition, including their argument that the lower court's decision "overturned more than 80 years of settled California law." That court unanimously denied a hearing.

For the reasons discussed below, this Court should also deny the present petition.

SUMMARY OF THE ARGUMENT

Petitioners' main argument is that the lower court's decision is a "retroactive" application of new principles which has undermined petitioners' careful reliance on prior law. There are at least three major problems with this argument. First, a proper analysis of the earlier California cases shows that no "new principles" are in fact involved. Second, petitioners' own evidence shows that they were well aware of the independence of local churches in property matters, yet took no effective steps to assert any purported "hierarchical" control. Third, the hierarchy approach could not in any event be used in this case since the identity of the governing body in the Episcopal church, if any, is at least a matter of "substantial controversy."

Similarly, the lower court properly rejected the so-called "implied trust" approach because the basic question it

asks—whether contributions were made to the general church regardless of doctrine, or the local church regardless of structure—would necessarily require a court to address what are essentially theological issues.

Finally, the reasoning in *Jones v. Wolf* permits California to find in favor of a local church under neutral principles of law, in terms of asking whether there is any express trust in favor of the general church, even if the general church is "hierarchical" in ecclesiastical matters. This is constitutionally proper even though other states may have chosen to follow some other approach.

For all these reasons the petition should be denied.

ARGUMENT

1. The Lower Court's Decision Is Not "Retroactive", Petitioners Took No Action Despite Their Knowledge of Local Church Autonomy, and the Hierarchy Approach Is in Any Event Not Applicable

The primary thrust of petitioners' argument is that the lower court's decision has "retroactively" overturned more than 80 years of settled California law; that petitioners had relied on the assumption that the "hierarchy" approach as set forth in *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872), would apply; and that the hierarchy approach could constitutionally be applied in this case. None of these premises is correct.

First, the true history of California law in this area is set forth in *Presbytery of Riverside v. Community Church of Palm Springs,* 89 Cal.App.3d 910 (1979), *cert. denied,* 444 U.S. 974 (1979). In that case the court carefully analyzed

prior California cases since *Watson v. Jones*, including the specific authorities upon which plaintiffs rely,[2] and found *no support* for the basic principle of the hierarchy approach: that the property of a local church which is part of a general church having a hierarchical structure is held in trust for the general church. In fact, the court reached exactly the opposite conclusion:

> Thus, properly read, *Wheelock* stands for the proposition that the property of a local church, *even one that is part of a general church organization of hierarchical structure*, is held in trust by the religious nonprofit corporation for the benefit of the *local* church congregation. 89 Cal.App.3d at 927 (emphasis addded).

Contrary to petitioners' assertion, then, the hierarchy approach has not been "consistently followed" in California, nor do the earlier California cases cite *Watson* in support of a trust in favor of the general church.

Second, in reviewing petitioners' one-sided historical narrative, one point is abundantly clear: for over 100 years petitioners knew that their supposed ecclesiastical authority did not give them any enforceable legal rights in the *property* of local churches.[3] Yet they either did not or could not take any effective steps to assert their purported "hierarchical" control. Unlike churches which are truly hier-

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[2] *Committee of Missions v. Pacific Synod*, 157 Cal. 105 (1909); *Wheelock v. First Presbyterian Church*, 119 Cal. 477 (1897); *Horsman v. Allen*, 129 Cal. 131 (1900); and *Rosicrucian Fellowship v. Rosicrucian Church*, 39 Cal.2d 121 (1952).

[3] None of the evidence upon which petitioners rely in this regard was admitted at trial. In the unlikely event that this Court does grant certiorari herein, we respectfully reserve the right to present controverting evidence on this issue.

archical, for example, petitioners never took the simple and straightforward step of requiring local churches to include express trust language in their articles of incorporation or reversionary language in their deeds.

Certainly the things petitioners did do, on the other hand, fall far short of creating a trust. The fact that the Diocese incorporated and thereby obtained legal capacity to sue, for example, is obviously not sufficient. And while the Diocese may in 1878 have considered a regulation to require all existing parishes and missions to convey their real property to the Bishop, *no such regulation was ever adopted.* A comparable situation was presented in *Riverside,* where the general church considered—but did not adopt—a proposal to require all local churches to amend their articles to declare a trust in favor of the general church. 89 Cal.App.3d at 932.

In this regard it should also be noted that the Diocese knew full well how to create an express trust when that was the parties' true intent. For example, in Canon X, section 9.15 of the Diocesan Canons, the following language appears:

> [Upon incorporation of a parish] the Diocesan Corporation shall convey to the Parish Corporation successor of such mission any and all property then held in trust for such Mission, *and the trust with respect to any such property, shall then terminate....* (emphasis added)

It is undisputed that no similar provision of the constitution of either the Diocese or the national church purports to create an express trust in local church property.

In addition, the one specific provision of the Diocesan Constitution which by its terms does apply to the particular situation in this case—Article XIX—specifies that the penalty for "persistent disregard" of Diocesan Canons is severance of the *connection* between a local church and the Diocese, not a forfeiture of local church property.

It should also be noted that over seven full years before the disputes in this case arose, this Court made the following observation in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969):

> Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions. 393 U.S. at 449.

This petitioners simply did not do.

Third, petitioners' retroactivity argument also fails because the approach they claim the lower court should have used—hierarchy—could not constitutionally have been applied in this case. The reason is that while the hierarchy approach may in certain instances be consonant with the First Amendment, it may *not* be applied in cases where the identity of the governing body or bodies within a church is a matter of "substantial controversy." *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 369-70 (1970). Without belaboring the point, that is certainly true in the present case, as the Episcopal Church at most is hierarchical with

regard to ecclesiastical matters, but not with regard to church property.[4]

In conclusion, if any *one* of petitioners' three premises is wrong, their retroactivity argument collapses. As shown above, all three are incorrect: the lower court's decision is fully consistent with prior California law; petitioners took no action to assert their purported hierarchical property rights; and the First Amendment in any event precludes the use of the hierarchy approach in this case.

2. The Lower Court Properly Rejected the So-called "Implied Trust" Approach As Requiring an Inquiry Into Ecclesiastical Questions

Petitioners' second argument is that the lower court improperly rejected the so-called "implied trust" approach even though, as the lower court noted, such necessarily involves an inquiry into ecclesiastical matters. Initially, we note that in large part the lower court was simply following the lead of the Georgia Supreme Court, which also rejected the implied trust approach, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial*

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[4]"A denomination need not adhere strictly to any one of the three polities mentioned—episcopal, presbyterian or congregational. It may avail itself of parts of one, two or even all three. An example of the last possibility is the Protestant Episcopal Church in the Diocese of Maryland, which has a bishop as part of an Episcopal polity, but is governed on a diocesan level by the bishop and the Convention consisting of the clergy and certain elected laymen (a characteristic of the presbyterian polity), but . . . the control of parish or local church property is in the hands of the Vestry or trustees for the local church or parish . . . ." *Maryland and Virginia Eldership v. Church of God*, 241 A.2d 691, 699, 249 Maryland 650 (Md. 1968), *appeal dismissed*, 396 U.S. 367 (1970).

Presbyterian Church, 393 U.S. 440 (1969), 167 S.E.2d 658 (Ga. 1969), *cert. denied*, 396 U.S. 1041 (1970).

Notably petitioners also fail to distinguish between two different interpretations of the "implied trust" approach. First, if this approach means that a trust necessarily exists in favor of a general church which is hierarchical in nature, without further inquiry, it is for all practical purposes identical to the *Watson* approach. As discussed above, however, California has rejected this type of "structural" solution. *Presbytery of Riverside, supra*, 89 Cal.App.3d at 929 ["The basic question in a controversy such as this should be the ownership of civil and property rights as shown by the conduct and acts of the parties. A classification based on a formula is not of much assistance . . . ." (citation omitted)].

Alternatively, if the implied trust approach means that courts must attempt to determine, without benefit of documents which definitively resolve the matter, to whom church members intended their contributions to go, such inevitably would require an inquiry into ecclesiastical questions. Simply stated, where the national church and a local church have gone in different theological directions, there is no way for a court to decide, other than by identifying the "true" church, whether such contributions were intended to foster a particular religious structure, *i.e.*, the general church, regardless of which theological direction it takes; or a particular set of religious beliefs, regardless of what structure is involved. As the lower court noted, an implied trust necessarily cuts two ways. (Appendix at 18a) For these reasons the lower court properly noted that this

approach cannot serve as a constitutional method for resolving church property dispute.[5]

3. A State May Resolve a Church Property Dispute in Favor of a Local Church Under Neutral Principles of Law, Asking Whether There Is an Express Trust in Favor of the General Church, Even if the General Church Is "Hierarchical" in Ecclesiastical Matters

The lesson of *Jones v. Wolf* is that the neutral principles approach, at least in general outline, is consistent with applicable constitutional principles as expressed in the First and Fourteenth Amendments. Further, and as the Court previously noted in *Maryland & Virginia Eldership v. Church of God at Sharpsburg, Inc., supra,* 396 U.S. at 368, a State may adopt any one of various approaches, including the neutral principles approach, so long as it involves no consideration of ecclesiastical matters.

This being so, the lower court's use of neutral principles of law to resolve this dispute did not violate petitioners' constitutional rights, nor even raise any new constitutional issue. In this regard the fact that certain other states have continued to adhere to the hierarchy approach, as petitioners note, is beside the point. Consistent with its prior judicial decisions in this area, California has chosen to resolve church property disputes under neutral principles of

[5]All three members of the lower court, including Justice Roth in dissent, agreed that the implied trust approach should be rejected for this reason. In this regard Justice Roth stated that "I accept the conclusion of my colleagues that the so-called implied trust theory, insofar as it is claimed to operate in instances involving disputes among church members over the control of church property, is unacceptable in that it requires courts to interject into the litigation their own notions respecting religious doctrine which attempted application of the theory places in issue." (Appendix at 29a)

law, namely, by asking whether all the evidence, construed in secular terms, reveals any express trust in favor of the general church. The answer to that question in the present case, according to the California Supreme Court, the California Court of Appeal, *and* the trial court, is "no."[9]

CONCLUSION

For all of the foregoing reasons, petitioners' writ of certiorari should be denied.

Dated: August 20, 1981.

Respectfully submitted,

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[9]In addition, the Attorney General of the State of California, who was named as a defendant in his statutory capacity of supervising the operation of charitable trusts, took no position on the merits because, among other things, "No party to this litigation takes the position that church assets may be diverted from church purposes, and in fact both parties take the position that church assets are held in trust exclusively for church purposes."

This Court has also spoken clearly and often in this area in recent years. Most recently, in January of this year it denied certiorari in the case entitled *Protestant Episcopal Church in the Diocese of New Jersey v. Graves*, 391 A.2d 563, 161 N.J. Super. Court 230 (1978), *aff'd*, 417 A.2d 19, 83 N.J. 572 (1980), *cert. denied*, 101 S.Ct. 954 (1981).